NO. 48746-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MIKHEAL D. BOSWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-01395-3

BRIEF OF RESPONDENT/RESPONSE TO MOTION OF APPELLANT'S COUNSEL TO WITHDRAW

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SERVICE		
	Catherine E. Glinski Po Box 761 Manchester, Wa 98353 Email: cathyglinski@wavecable.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the right, electronically.* . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 9, 2017, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

I. COUNTERSTATEMENT OF THE ISSUES

Whether counsel has correctly determined that there are no non-frivolous issues on appeal where:

1. Evidence that LE came to after passing out on the bathroom floor to discover Boswell having sex with her and that he continued to have oral, anal, and vaginal sex with her as she passed in and out of consciousness was sufficient to support the jury's verdict of guilt of second-degree rape;

2. The trial court did not violate Boswell's constitutional right to present a defense by excluding evidence of portable breath test results for which Boswell failed to lay the foundation and which were in any event irrelevant;

3. The trial court properly prohibited the State's expert from opining on LE's veracity;

4. The trial court did not err in refusing to give WPIC 6.41 where Boswell did not challenge the voluntariness of his statements.; and

5. The trial court properly declined to place the burden of proof for the reasonable belief defense upon the State.

II. STATEMENT OF THE CASE

The State accepts the statement of the case presented in counsel's brief, as supplemented in the argument portion of this brief.

III. ARGUMENT

COUNSEL HAS CORRECTLY DETERMINED THAT THERE ARE NO NON-FRIVOLOUS ISSUES ON APPEAL.

Counsel has cited as potential appellate issues five points:

1. Did the State present sufficient evidence to establish every element of the charged offense?

2. Did the court violate Boswell's constitutional right to present a defense by improperly excluding relevant evidence?

3. Did admission of improper opinion evidence violate Boswell's constitutional right to a jury trial?

4. Did the court err in refusing to give WPIC 6.41?

5. Did the court err in failing to instruct the jury that the State had the burden of proving lack of consent?

Counsel correctly notes that none of these claims has merit.

When a court-appointed attorney files a motion to withdraw on the ground that there is no basis for a good faith argument on review, pursuant to *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970) and *Anders v.*

California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), the motion to withdraw must:

> (1) be accompanied by a brief referring to anything in the record that might arguably support the appeal. (2) A copy of counsel's brief should be furnished the indigent and (3) time allowed him to raise any points that he chooses; (4) the court -- not counsel -- then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

Theobald, 78 Wn.2d at 185, *quoting Anders*, 386 U.S. at 744.

Counsel has complied with this procedure. The State concurs counsel's assessment of the issues, as discussed below. The Court should therefore grant counsel's motion to withdraw and affirm the ruling of the court below.

1. Evidence that LE came to after passing out on the bathroom floor to discover Boswell having sex with her and that he continued to have oral, anal, and vaginal sex with her as she passed in and out of consciousness was sufficient to support the jury's verdict of guilt of second-degree rape.

Counsel suggests that Boswell could argue that the evidence was insufficient to establish the crime of second-degree rape. This claim is without merit because taken in the light most favorable to the State, the evidence was sufficient for the jury to find beyond a reasonable doubt that Boswell engaged in sexual intercourse with LE while she was incapable of consent due her mental or physical incapacity.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Applying these standards, the evidence was sufficient. To convict a defendant of second-degree rape as charged, the State must prove:

> (1) That on or between June 6, 2015 through June 7, 2015, the defendant engaged in sexual intercourse with [LE];
>
> (2) That the sexual intercourse occurred when [LE] was incapable of consent by reason of being physically helpless or mentally incapacitated; and
>
> (3) That this act occurred in the State of Washington.

RCW 9A.44.050(1)(b); WPIC 41.02 (4th Ed); CP 73. Mental incapacity and physical helplessness are defined as follows:

> Mental incapacity is a condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance, or by some other cause.
>
> A person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

RCW 9A.44.010(4) & (5); WPIC 45.05; CP 77.

Here, LE passed out on the bathroom floor after a night of drinking. 3RP 370-74. LE testified that she remembered waking up and realizing Boswell was having sex with her. 2RP 161. It was not something she wanted, but she was unable to move. She passed out, and when she woke again Boswell was repositioning her. 2RP 163. LE testified that she was frozen and unable to respond throughout the encounter. 2RP 171. She testified to acts of vaginal, oral, and anal intercourse. 2RP 164, 179, 225. Under these circumstances, the jury was

entitled to reject any assertion on Boswell's part that he "reasonably believed that [LE] was not mentally incapacitated or physically helpless." CP 74; *see also* RCW 9A.44.030(1) (establishing defense of reasonable belief); *State v. Ortega-Martinez*, 124 Wn.2d 702, 714, 881 P.2d 231 (1994). This claim would thus be without merit.

2. The trial court did not violate Boswell's constitutional right to present a defense by excluding evidence of portable breath test results for which Boswell failed to lay the foundation and which were in any event irrelevant.

Counsel suggests that the trial court erred in excluding evidence of portable breath tests (PBTs) taken after the rape. This claim is without merit because a defendant's constitutional right to present evidence does not extend to evidence that is inadmissible.

Both the U.S. and Washington Constitutions guarantee criminal defendants the right to present evidence in their own defense and the right to confront and cross-examine adverse witnesses. U.S. Const. amend. VI; *Const. art. I*, § 22; *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Nevertheless, the trial court has discretion to determine both the admissibility of evidence and the scope of cross examination. *See State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991); ER 611(b). A criminal defendant has "no right, constitutional or otherwise, to have irrelevant evidence admitted" in his or her defense. *State v. Darden*, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002).

This Court will not reverse the trial court's ruling absent an abuse of discretion. "A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." *State v. McDaniel*, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996), *review denied*, 131 Wn.2d 1011 (1997).

In *State v. Smith*, 130 Wn.2d 215, 221-22, 922 P.2d 811 (1996), the Washington Supreme Court held that results garnered from PBTs are "inadmissible for any purpose" absent "a *Frye*[1] hearing on the PBT, or specific approval of the device and its administration by the state toxicologist." Boswell failed to establish that the PBTs in this case were given in compliance with the relevant toxicology regulations. Moreover, the results were not relevant.

Boswell initially conceded that under the WAC, the PBTs were admissible only to show probable cause so he "really did not have argument on that." 1RP 8. The trial court thus granted the State's motion in limine number five.[2] *Id.*

Boswell then delved into his PBT results during the CrR 3.5 hearing. 1RP 41. On redirect, the detective testified that PBT readings are not necessarily indicative of a person's level of impairment. 1RP 44. He

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[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir.1923).

[2] CP 19.

further observed that Boswell did not display any sign of impairment. *Id.*

After the court found his statements were admissible, Boswell then asked the court to reconsider its ruling on motion in limine number five. 1RP 56. He argued that the PBT should be admissible to impeach the detective's testimony that Boswell did not exhibit any signs of impairment. 1RP 57. Boswell further argued that the numbers were relevant to gauge the validity of the statements he made to the detective.[3] 1RP 69. He also argued that LE's results were relevant to her state of mind. 1RP 70.

The State responded that the results were not impeaching because the detective did not testify that Boswell had not been drinking, only that he did not show signs of impairment. *Id.* The State further proposed that it would have no objection to the detective testifying that he administered the PBT and that it showed signs of consumption. *Id.* The State maintained its opposition, however, to the admission of the actual results.[4] 1RP 58.

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[3] At trial, however, Boswell testified that he knew what he was doing when he spoke to the detective:

> Q. At that point in time, were you still under the influence of alcohol when you were talking to Deputy Manchester?
>
> A. I was in no position to be behind the wheel, but I was – I had a clear enough head to know the decision I was making.

3RP 439.

[4] Boswell's test showed a 0.16 and LE's a 0.11. 1RP 58.

The State noted that the record did not establish that the detective was properly certified as required by WAC 448-15-020. 1RP 59, 71. The State also submitted that the numbers failed the test of relevance because they did not establish, standing alone, anyone's level of impairment. 1RP 58, 71. The State also essentially argued that any relevance would be outweighed by the prejudicial effect because of the pure speculation involved. 1RP 72.

The Court adhered to its ruling granting the motion in limine. 1RP 73. The court did permit evidence that PBTs were administered and that they showed consumption. *Id.* Its ruling was based on Boswell's failure to meet the foundational requirements for admissibility set forth in the WAC. *Id.* The court also granted Boswell leave to attempt to meet the foundation. 1RP 73. Boswell, however, never raised the issue again and did not attempt to lay a foundation when the detective testified.

Because Boswell did not even attempt to meet the admissibility requirements of *Smith* and the WAC, the trial court did not abuse its discretion. Moreover, as the State argued below, the numbers alone, while indicative of a per se DUI for purposes of probable cause, are not probative of a person's actual level of impairment. As such the evidence would have been speculative and irrelevant.

Finally, any error would be harmless beyond a reasonable doubt.

Boswell extensively cross-examined the detective about whether LE appeared intoxicated. 2RP 226-27. He also delved into the subject with the SANE nurse examiner. 2RP 313. As for his statements to the detective, as noted above, Boswell himself testified that he was well aware of what he was doing when he spoke to the detective. Counsel has properly determined this claim to be without merit.

3. The trial court properly prohibited the State's expert from opining on LE's veracity.

Counsel suggests that the State's expert's testimony constituted an opinion on LE's veracity and, by implication, Boswell's guilt.. This claim is without merit because the trial court explicitly prohibited the expert from discussing the victim at all.

A witness may not offer an opinion regarding the defendant's guilt, either by direct statement or by inference. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such an opinion violates the defendant's right to a jury trial, which vests in the jury "'the ultimate power to weigh the evidence and determine the facts.'" *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (*quoting Const. art. I*, § 21, and *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the

charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Montgomery*, 163 Wn.2d at 591.

Boswell's reliance on *Black* and *State v. Haga*, 8 Wn. App. 481, 507 P.2d 159 (1973), is misplaced; these cases are distinguishable. In each, the witness either gave or was asked to give his opinion on the credibility of another party. A direct opinion on the credibility of the victim was given in *Black*, and an indirect opinion on the guilt of the defendant was given in *Haga*.

In *Black*, the expert whose testimony was challenged had testified that "'[t]here is a specific profile for rape victims and [the victim] fits it.'" *Black*, 109 Wn.2d at 339 (emphasis omitted). Likewise, in *Haga*, an ambulance driver who responded to the scene of a double murder testified that the defendant, the husband and father, respectively, of the victims, was unusually "'calm and cool about it,'" behavior very unlike that of the innocent relatives of murder victims whom the driver had observed. *Haga*, 8 Wn. App. at 490.

Here the trial court, relying on *State v. Ciskie*, 110 Wn.2d 263, 280, 751 P.2d 1165, 1174 (1988), explicitly prohibited the State's expert from discussing LE at all:

> [T]he doctor will not be allowed to invade the province of the jury. They will not be allowed to testify about meeting with the victim or equate the information they're providing

> the jury with the victim in any sort of profile or anything of that nature. It's my understanding that her testimony will be informational but will not relate to the victim, and that's going to be part of my ruling.

1RP 84-85. The expert completely complied with this ruling. 2RP 258-79. Counsel correctly determined that this issue was without merit.

4. The trial court did not err in refusing to give WPIC 6.41 where Boswell did not challenge the voluntariness of his statements.

Counsel suggests that Boswell could argue that the trial court erred in refusing to give WPIC 6.41. This claim is without merit because that instruction is only appropriate where the defendant challenges the voluntariness of his statement at trial through evidence or cross-examination.

This Court reviews this challenge to jury instructions de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

WPIC3 6.41 instructs jurors that they "may give such weight and credibility to any alleged out-of-court statements of the defendant as [they] see fit, taking into consideration the surrounding circumstances." *State v.*

Smith, 36 Wn. App. 133, 141, 672 P.2d 759 (1983), provides that a defendant is entitled to a WPIC 6.41 instruction when he raises the issue of the voluntariness of the statements after the court rules against the defendant's earlier CrR 3.5 motion to exclude the statements. A defendant's right to a WPIC 6.41 instruction is procedural and not constitutionally mandated. *State v. Taplin*, 66 Wn.2d 687, 691, 404 P.2d 469 (1965).

Here, Boswell never challenged the voluntariness of his statements at the CrR 3.5 hearing. Indeed, at the close of the officers' testimony, he stated "I have no argument." 1RP 54. Then as noted previously, during trial Boswell himself testified that he understood what he was saying to the Detective. 3RP 439.

Boswell did not challenge the voluntariness of his statements to law enforcement. He was not, then, entitled to an instruction on the voluntariness of his statements. *Smith*, 36 Wn. App. at 141, 672 P.2d 759. Counsel properly determined that the court did not err in declining to give such an instruction.

5. The trial court properly declined to place the burden of proof for the reasonable belief defense upon the State.

Counsel suggests that the trial court erred in refusing Boswell's

proposed instruction on the defense of reasonable belief.[5] This claim is without merit because, as trial counsel conceded, the statute properly places the burden of proof for this defense on the defendant.

RCW 9A.44.030(1) provides a defense to rape as charged in this case:

> In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

WPIC 19.03 as given in this case is consistent with this statutory language:

> It is a defense to a charge of rape in the second degree that at the time of the acts the defendant reasonably believed that [LE] was not mentally incapacitated or physically helpless.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 74. Boswell proposed this instruction, CP 58, and the trial court gave it.

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[5] Appellate counsel erroneously characterizes the proposed instruction as pertaining to lack of consent. The proposed instruction was based on the defense of reasonable belief that the victim was not incapacitated, as set forth in RCW 9A.44.030(1) and on a modified version of WPIC 19.03, which addresses that defense. CP 59.

Boswell also proposed a modified version of the instruction that would have shifted the burden of proof to the State. CP 59. The trial court rejected this instruction because the defense did not negate an element of the offense; the Legislature was thus entitled to place the burden of proof on the defense. 4RP 484-485. Boswell himself conceded that the ruling was in line with controlling precedent. 4RP 484.

The trial court's ruling was correct, and the controlling law is accurately summarized in the Comment to WPIC 19.03:

> *Burden of proof.* It is now settled that the Legislature may place the burden of proving a statutory defense on the defendant. The statute is cited in *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984), and *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983), as an example of the Legislature "clearly" providing "that a defendant must prove certain defenses by a preponderance of the evidence."
>
> The reasonable belief instruction does not shift the burden of disproving the victim's incapacity to the defendant. The instruction does not require the defendant to prove that the victim was not incapacitated – only that the defendant reasonably believed that the victim had capacity. *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009); *State v. Coristine*, 161 Wn. App. 945, 252 P.3d 403 (2011), *reversed on other grounds*, 177 Wn. 370 (2013). *See also In re Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007).

Counsel has correctly determined that this issue lacks merit.

IV. CONCLUSION

For the foregoing reasons, Boswell's conviction and sentence should be affirmed, and counsel should be permitted to withdraw.

DATED January 9, 2017.

Respectfully submitted,

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